No. 14,847

In the

United States Court of Appeals

For the Ninth Circuit

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORP., LIMITED, a CORPORATION,
Appellant,

vs.

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION, a CORPORATION,
Appellee.

Brief for Appellee

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STATEMENT OF JURISDICTION

This appeal is from a judgment of the District Court for the Northern District of California in a civil action between a resident of the State of Delaware and a resident of the Kingdom of Great Britain. The matter in controversy exceeded the sum of value of $3,000, exclusive of interest and costs. (R. 3-6) These allegations were admitted by the answer. (R. 24) The District Court found them to be true. (R. 27) Jurisdiction of the District Court is therefore sustained by 28 U.S.C. § 1332.

The appellee admits that the appeal was timely taken and timely docketed. *Rules of Civil Procedure,* Rule 73(a), (g). Jurisdiction of this court is therefore sustained. (28 U.S.C. §§ 1291, 1294).

STATEMENT OF THE CASE

1. Nature of the Action.

Appellee obtained a judgment for $15,728.57 against appellant in the District Court, sitting without a jury, in an action on a policy of fidelity insurance issued to appellee by appellant which insured appellee, to a limit of $50,000, against loss caused by the fraud or dishonesty of one or more of appellee's employes.

2. The Issue.

At the trial the issues were narrowed to the amount of loss and whether or not the loss was covered by the policy of insurance. (R. 34) The amount of the loss was established at the trial by direct and undisputed evidence at $15,728.57 and is not in dispute on this appeal (App. Br. 3). At the trial it likewise developed there was no dispute as to the fact that the loss was caused by the fraud or dishonesty of someone. The question before the trial court was only as to who participated in the fraud or dishonest act.

The only issue raised by appellant on this appeal is whether there is sufficient evidence to support one finding of the trial court, to-wit:

> "The said loss was alleged by plaintiff to be and the evidence adduced reasonably establishes that it was due to the dishonesty of one or more of plaintiff's employees rather than to the act of a stranger." (R. 29)

3. The Facts.

It is necessary for appellee to restate the pertinent facts. Appellant's statement of the facts left out many of the significant facts. Furthermore, appellant ignored the settled principles of law that in an appeal all conflicts in the evidence are deemed to have been resolved in favor of the prevailing party and that such party is given the benefit of every favorable inference that may reasonably be drawn from the evidence adduced.

The policy of fidelity insurance issued by the appellant, obligated the latter to indemnify appellee for loss:

> "Through any fraudulent or dishonest act or acts, committed anywhere by any of the Employees acting alone or in collusion with others, including loss of Money and Securities and other property through any such act or acts of any of the Employees, and including that part of any inventory shortage which the Assured shall conclusively prove to have been caused by the fraud or dishonesty of any of the Emploees, the amount of insurance on each of such Employees being the Limit of Liability applicable to this Insuring Agreement 1."

By said policy defendant further agreed:

> "If a loss is alleged to have been caused by the fraud or dishonesty of any one or more of the Employees and the Assured shall be unable to designate the specific Employee or Employees causing such loss, the Assured shall nevertheless have the benefit of this Insuring Agreement, provided that the evidence submitted reasonably (in case of inventory shortage, conclusively) establishes that the loss was in fact due to the fraud or dishonesty of one or more of the said Employees, and provided further that the aggregate liability of the Company for any such loss shall not exceed the Limit of

Liability applicable to this Insuring Agreement 1." (R. 4)

One of the premises covered under this policy is the Oakland office of appellee, a small completely enclosed metal building located near the administration building at the Oakland Municipal Airport in the City of Oakland, Alameda County, California. (R. 5, 139) It is partitioned into two rooms by means of a wall, the lower three and a half feet of which is wood and the remainder glass. (R. 137-138) The front of the building is of similar construction. (R. 138) When lighted the rear office, including the desk hereinafter referred to, is plainly visible from the street outside. (R. 135-137) Across the street from the office, at a distance of about 75 feet, is an all night gas station and parking lot, the lights from which illuminate the area in front of the office. (R. 155, 161) The rear of the building opens into a hangar. The airport premises around the office are regularly patrolled by airport guards. (R. 129-130)

There were four full time employes at appellee's Oakland office at the time of the loss. In charge was Homer Scott, appellee's Western Regional Manager. (R. 163) Scott's immediate assistant and secretary was Evelyn Keene who had worked with Scott prior to their being employed by appellee. (R. 78, 172) The third, Robert Lee Farquhar, sold tickets and collected cash from military personnel purchasing air transportation. (R. 46) The fourth was Richard B. Held whose principal duties were the meeting of inbound and loading of outbound aircraft but who also did sales work. (R. 148) A part time employe, Harold Pitts, did the janitorial work at the office every morning between 5 and 7. (R. 60) All of these employes had keys to the office. (R. 75, 88, 148, 174)

There were three other employes working at nearby military installations, another at Monterey, and a fifth at San Diego. (R. 65)

On Wednesday, November 25, 1953, appellee's office in Oakland had collected over $15,000 in currency from the sale of airplane tickets to military personnel on Treasure Island. (R. 48-49) Scott was instructed over the telephone by Francis J. Roach, appellee's comptroller in Washington, D. C., to purchase a Western Union money order with this money because the Oakland office had no safe place to keep such a substantial sum. (R. 38-39, 164-166) In spite of these specific instructions this action was not taken. Instead, the money was placed in a safe at a nearby office of Transocean Air Lines and a receipt for the amount was obtained. (R. 80-82) The only explanation offered for this failure to obey the instructions was that Evelyn Keene felt that the cost of obtaining the money order was excessive and Scott, for some unexplained reason, respected Mrs. Keene's judgment more than that of his superior. (R. 78, 83-84, 166, 172)

Thursday, November 26, 1953, was Thanksgiving Day and the money remained in the Transocean safe until Friday morning, November 27th. (R. 85) Prior to its being placed in the safe, the money had been counted as the exact amount had to be ascertained before a money order could be obtained. (R. 108) On Friday no steps were taken to deposit the money in the bank. (R. 87) Mrs. Keene, who made deposits for appellee from time to time, testified that the money was still being counted early in the evening and she had no idea that the banks were open until 6 on Friday. (R. 87, 99) Scott, when asked why they didn't count some fixed amount and deposit it, offered only the following explanation: "That is right, we could have. However, it is usual

procedure to keep cash on hand and make up your ticket reports to correspond to it." (R. 180)

About 7 o'clock on Friday evening, November 27, Mrs. Keene left the office, leaving Scott and Farquhar with the money. (R. 88) According to Scott the Transocean safe was not available to him that evening. (R. 178) The Western Union office, however, was open. (R. 98) Farquhar suggested that the money be placed in the safe of the gas station across the street. Finally the money was locked in a metal cash box and placed in Scott's desk in the rear room and the desk was also locked. (R. 58, 167) Scott had the only key to the desk. (R. 56) The desk, however, could be opened without a key. (R. 73, 93, 169) Farquhar had a key to the cash box and Ferris who worked for appellee at Treasure Island had another key. (R. 188) There was at least one other key in the drawer of an unlocked desk in the front office. (R. 188) Farquhar and Scott then locked the front and rear doors, leaving the lights on, and left the office between 7:30 and 8:00 o'clock. (R. 58-59, 167)

Scott and Farquhar went to the airport bar and had several drinks. Farquhar left the bar about 8:45. (R. 61) Scott left the bar about 8:30 and returned to the office. Scott testified that he called his wife from the office to let her know he was on his way home. (R. 173) Although Scott had no recollection of the matter, it was later established by the police that he also placed a call to Washington, D. C. at 9:10. (R. 173-174) Scott apparently left the office soon thereafter and drove to his home in Lafeyette about 20 miles away, arriving shortly before 10 P.M. At the time he left the doors were locked. (R. 173-175)

On Saturday morning Mrs. Keene arrived at the office between 8 and 8:30. She found the front door locked and the

rear door bolted. (R. 88) She observed nothing out of place and saw no signs of any forcible entry either of the building or Scott's desk. (R. 88-89) Scott arrived soon thereafter. (R. 89) He gave Mrs. Keene the keys to his desk and asked her to see if the cash box was still in his desk. (R. 90) This was the only time Mrs. Keene remembered his requesting her to do this. (R. 91) She ascertained that the box was still there, locked the desk again without taking the cash box out, and returned the keys. (R. 90) About 10:30 Mrs. Keene called Farquhar who lived in Berkeley, a considerable distance from the Oakland airport, and asked him to come to the office to pick her up and take her to the bank. (R. 62, 89) While Farquhar was en route, Mrs. Keene for the first time decided to check to see if the bank was open on Saturday and found that it was not. (R. 62, 96-97)

Held arrived at about 11:00 o'clock and Farquhar reached the office at approximately 11:30. (R. 62) At 12:30 it was decided to count the cash *again* and Scott gave Farquhar his key to the desk. Farquhar unlocked the desk, took out the cash box, opened it in the presence of Scott, Keene and Held and found the currency missing. Coin, checks and money orders remained in the box. (R. 63-64) At this moment Scott turned grey. (R. 92)

Subsequently the disappearance of the money was investigated by the Grand Theft Detail of the Oakland Police Department. This investigation revealed that, although one window in the building was not latched, the presence of undisturbed dust in the area made it clear that no entry had been made through the window. (R. 123) The investigation also confirmed the fact that no forcible entry of the premises, the desk or the box had been made. (R. 122-123, 133-135) Experts in the police department tried to open the cash box without a key but failed to do so. (R. 122, 128-129)

As a result of their investigation, Inspectors Mallon and Gustavson of the Oakland Police Department concluded that the rear door could not be opened from outside without breaking it. (R. 121, 127) It was difficult to open even with the bolt drawn. (R. 133) No contradictory evidence was given.

The inspectors similarly concluded that it would be impossible to open the front door without a key. (R. 118, 132-133) Farquhar testified he once had to break a window when he forgot his key. (R. 72) Mrs. Keene testified she had a similar experience. (R. 95) There was other evidence to the effect that the front door could be opened with a plastic card. (R. 94, 150-151)

ARGUMENT

1. Summary of Argument.

The trial court properly found that one or more of plaintiff's employes participated in the theft causing the loss.

This court should not reverse the trial court unless it is convinced that the finding of the trial court is clearly erroneous.

Appellee is entitled to rely on circumstantial evidence and need only show that it is more probable than not that the loss was caused by the fraud or dishonesty of one or more of its employes acting alone or in collusion with others.

Appellee established by the preponderance of the evidence that the loss was covered by the Policy.

2. Scope of Review.

On appeal the findings of the trial court are presumed to be correct and may not be set aside unless clearly erroneous. Rule 52 (a), *Federal Rules of Civil Procedure; California Motor Transp. Co. v. Fidelity & Casualty Co.* (9th

Cir. 1951), 192 F.2d 640, 643. In considering whether the trial court's findings are clearly erroneous appellee must be given the benefit of all favorable inferences which may reasonably be drawn from the evidence. *Lassater v. Guy F. Atkinson Co.* (9th Cir. 1949), 176 F.2d 984; *Skelly Oil Co. v. Holloway* (8th Cir. 1948), 171 F.2d 670, 674.

That the trial court could have viewed the facts differently or that this court might have done so if it had been the initial trier of fact does not mean that the trial court's finding is clearly erroneous. If reasonable men may draw different inferences from the evidence adduced, this court should not substitute its judgment for that of the trial court. *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342; *Shoso Nii v. Brownell* (9th Cir. 1953), 206 F.2d 895, 897.

3. Rules Governing the Evidence.

By the specific provisions of the policy appellee is entitled to recover thereunder if "the evidence submitted reasonably * * * establishes that the loss was in fact due to the fraud or dishonesty" of one or more of its employes "acting alone or in collusion with others ". (R. 4) Applying the rule that any doubts as to the meaning of an insurance contract will be resolved against the insurer, *Bankers Life Co. v. Jacoby,* (9th Cir. 1951), 192 F.2d 1011, 1014, the contract here seems to impose a lesser burden on plaintiff than the ordinary "preponderance of the evidence rule". However, in this case the trial court required appellee to prove its case by a preponderance of the evidence. (R. 124) We submit that on the basis of the language of the insurance contract this court may sustain the judgment on the ground that appellee fully met the requirements of the insurance policy.

In any event appellee is certainly entitled to recover if the evidence submitted establishes, by the preponderance there-

of, that the loss was due to the fraud or dishonesty of one or more of its employes acting alone or in collusion with others, and this is so even though a fraudulent, dishonest or criminal act is involved. *Linnell v. Landon & Lancashire Indemnity Co.* (1946), 74 N.D. 379, 22 N.W. 2d 203; *Farmers' Produce Co. v. Aetna Casualty & Surety Co.* (1927), 238 Mich. 405, 213 N.W. 685; 46 *C.J.S. Insurance, Section* 1359b, p. 562; 21 *Appleman, Insurance Law and Practice, Section* 12774, p. 466; cf. *Buxton v. International Indemnity Co.* (1920), 47 Cal. App. 583, 593, 191 Pac. 84 (rule applied in action to recover under policy of automobile insurance against theft.)

It is also the rule in this type of action that the essential facts may be established by circumstantial evidence. *Gaytime Frock Co. v. Liberty Mut. Ins. Co.* (7th Cir. 1945), 148 F2d 694; *Farmers' Produce Co. v. Aetna Casualty & Surety Co.* (1927), 238 Mich. 405, 213 N.W. 685; 21 *Appleman, Insurance Law and Practice,* Section 12774, p. 466. In fact, recovery has been awarded on circumstantial evidence where the policy required "direct and affirmative" evidence. *Miller v. Massachusetts Bonding & Ins. Co.* (1915), 247 Pa. 182, 93 Atl. 320. There is a split of authority on the requisite nature of such evidence. Some courts hold that the circumstantial evidence must be such that it fairly and reasonably excludes any other explanation than the existence of the fact or the occurrence of the event which is essential to plaintiff's recovery, that is to say, that such existence or occurrence must be the only conclusion that can fairly or reasonably be drawn.

Among the cases so holding are *Gaytime Frock Co. v. Liberty Mutual Ins. Co., supra,* and *Phipps v. American Employers' Ins. Co. of Boston, Mass.* (1935), 118 Pa. Super. 133, 179 Atl. 816.

Other courts hold that it is sufficient for the party having the burden of proof to make out the more probable hypothesis and that the evidence need not rise to that degree of certainty which will exclude every other reasonable inference. See e.g. *National Shirt & Hat Shops v. American Motor Ins. Co.* (1952), 234 N.C. 698, 68 S.E. 2d 824, 830-1. This view appears to be the preferable one since the other in effect requires proof beyond a reasonable doubt. *Northwest States Utilities Co. v. Ashton* (1937), 50 Wyo. 168, 65 P.2d 235, 239 rehearing denied 51 Wyo. 132, 69 P.2d 623.

The California rule is determinative in this case. The jurisdiction of the Court below is founded upon the diversity of citizenship existing between the parties. In this situation under the rule of *Erie Railroad Co. v. Tomkins,* 304 U.S. 64, the California law on the subject governs. *Fegles Const. Co. v. McLaughlin Const. Co.* (9th Cir. 1953), 205 F.2d 637, 639 n. 1. It is the rule of the California cases that a theory may be established by circumstantial evidence where such evidence shows that the theory is more probable than any other; such evidence need not reasonably exclude all other theories. *Barham v. Widing* (1930), 210 Cal. 206, 215, 291 Pac. 173; *Sanders v. MacFarlane's Candies* (1953), 119 C.A. 2d 497, 500, 259 P.2d 1010; *Vaccarezza v. Sanguinetti* (1945), 71 C.A. 2d 687, 691, 163 P.2d 470.

The rule of those cases that require that the circumstantial evidence exclude any other explanation is therefore inapplicable to the case at bar. This does not mean, of course, that a finding based on guesses or conjectures (such as that reversed in *Dobson v. Ind. Acc. Com.,* 114 C.A. 2d 782, 251 P.2d 349, cited by appellant) will be sustained. As we will show below, the inference accepted by the trail court is not only the more probable but is the only reasonable inference to be drawn from the evidence.

4. The Evidence Adduced at the Trial.

Appellee established by direct and uncontroverted evidence that it had suffered a loss of $15,728.57. The circumstances were such that no inference could reasonably be drawn other than that such loss was due to an act of fraud or dishonesty of some person or persons. This is not disputed by appellant. The money must, therefore, have been lost either (1) through the fraud or dishonesty of one or more employes of appellee (acting alone or in collusion with others) or (2) through the fraud or dishonesty of one or more persons not employed by appellee (and not acting in collusion with any employe or employes).[1]

Pursuant to the applicable rules of evidence heretofore stated and discussed, the trial court had only to determine which of the two alternatives was the more probable.

We submit that examination of the evidence shows that the trial court was justified in concluding that the first alternative was the more probable. It must be taken as established by the evidence that it was not customary to keep such a large sum of money in the office; that only employes of appellee knew that such would be done on the night of November 27th; that the money was kept in the office in direct disregard of prior instructions from the employer; that the back door was bolted and could not be opened from the outside; that the cash box was locked and could not be

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1. Appellant states as a fact, "Keys to the premises were possessed by employes who had been discharged by plaintiff." (App. Br. 7) If by this appellant means that those persons possessed such keys *while they were empolyed by appellee* there is support for such a statement. There is, however, no evidence that any such persons possessed a key to the premises at the time of the theft. Such might be a permissible inference from the evidence adduced, but it is not a necessary one. On this appeal it must be presumed that the trial court drew no such inference. Accordingly, no separate treatment is accorded these former employes.

opened without a key; that there was no forcible entry of the premises, the desk or the cash box; that only employes had keys to the premises, the desk and the box; that the premises were lighted and the rear room, where the money was left, was visible from the street outside; that there was no sign of any random search of the premises having been made, or of any property, other than the currency, having been taken or disturbed; that at least three of the employes (Scott, Mrs. Keene and Pitts, the janitor) were alone in the office on separate occasions on the night of November 27 and the morning of November 28, the time that the money was stolen.

Considering only the foregoing evidence it would appear that the trial court could reasonably have reached no other conclusion than that one or more of appellee's employes participated in the theft.

Appellant points to certain evidence which it contends makes the other alternative (that only strangers participated in the theft) not only a permissible inference but the only reasonable one to be drawn. This, we submit, is erroneous as will readily be seen when such evidence is examined.

The evidence thus relied upon by appellant is (1) that on frequent occasions before the theft the doors of the office were found open when the employes came to work, (2) the alleged fact that the front door could be opened without a key, (3) the alleged fact that only Scott had a key to the desk and only Farquhar had a key to the cash box, (4) that certain of the employes denied taking the money or participating in the taking of it, (5) that thefts at the Oakland airport were not uncommon (App. Br. 5-8) (6) that persons are presumed innocent of crime.

(1)-(4) It is of course elementary that testimony which is contradicted directly by other evidence, or is contrary to

inferences that may reasonably be drawn from other evidence, may be rejected by the trier of fact. It is also the law that on appeal it will be presumed that any such conflict in the evidence was resolved in favor of the prevailing party. *Waters v. United States* (9th Cir. 1951), 191 F.2d 212, 214; *Peterson v. Denevan* (8th Cir. 1949), 177 F.2d 411, 412.

The testimony that on frequent occasions before the theft the doors of the office were found open when employes came to work is, of course, relevant only because it could be inferred therefrom that the doors may have been open on the night or morning when the theft occurred. There is, however, direct testimony that both doors were locked when Scott left on the night of November 27 and were locked when Mrs. Keene arrived the next morning. (R. 58-59, 88, 167)

The evidence that the front door could be opened without a key was contradicted by the testimony of both police officers. (R. 118, 132-133) Mrs. Keene and Farquhar each testified that on occasions prior to the theft when they had forgotten their keys they had found it necessary to break a window to get into the office. (R. 72, 95)

According to the testimony, only Scott had a key to the desk in which the cash box was placed. This key, however, had been used by other employes with opportunity for duplicating it. In any event the testimony was clear that the desk could be opened without a key as demonstrated by Mrs. Keene. Only Farquhar admitted having a key to the cash box but there were other keys to this box in an unlocked desk in the outer office readily available to all the employes and another employe, Ferris, had a key that would unlock the cash box. (R. 188) Furthermore, the testimony with respect to the events of Saturday morning, when the loss was discovered, belie the truth of this testimony. Farquhar ostensibly was called by Mrs. Keene on Saturday solely for

the purpose of escorting her to the bank. (R. 62) On direct examination she testified she did not know why she called him instead of having Scott go with her. (R. 90) On cross examination she defended calling this employe who had the day off and who lived in Berkeley a substantial distance from the office on the ground that "it was unlikely for me to ask my boss to take me to the bank I guess." (R. 98) If we accept the denial of all of these employes of knowledge of the existence or whereabouts of the spare keys to the cash box, then the cash box could not have been opened without Farquhar and he would have had to be called to the office on Saturday. It is significant that this simple and obvious explanation escaped the witnesses at the trial.

Appellant seems to place considerable reliance upon the specific denials of dishonesty by those employes of appellee who testified at the trial. (App. Br. 8) This testimony is, we submit, directly contrary to inferences that may reasonably be drawn from other evidence in the case. In any event the four employes so testifying were not the only employes who had, or could have had, knowledge, means, and opportunity to commit the theft. Among these others is the janitor, Pitts, who was not called and did not testify at the trial.

As indicated above, in each instance the testimony relied upon by appellant was either directly contradicted by other evidence or was contrary to inferences which could be drawn therefrom. The trial court was therefore free to resolve such conflict against appellant and on appeal we must presume that it did so.

Even if, contrary to what we believe to be the fact, some of the foregoing testimony is deemed to be uncontradicted, the trier of fact was still entitled to reject it. All of this testimony was given by employes who would be natural suspects and who were in fact all interrogated by the police

and given lie detector tests. (R. 123) Since the testimony in question tended to show that it was possible that some stranger was responsible for the theft, it is obvious that each of the witnesses had an interest in so testifying. This is particularly true of the outright denials of complicity in the theft. For this reason alone the trial court was free to disbelieve all of such testimony. *Broadway Music v. Havana Madrid Restaurant Corp.* (2d Cir. 1949), 175 F.2d 77, 80.

While we do not believe it is here necessary to rely upon such a principle of law in view of the conflict in the evidence and the "interest" of these witnesses, it appears to be the settled rule that the trier of fact, as the sole judge of the credibility of witnesses, is free to reject even uncontradicted testimony. *Ly Shew v. Dulles* (9th Cir. 1954), 219 F.2d 413, 416; *Quon v. Niagara Fire Ins. Co. of New York* (9th Cir. 1951) 190 F.2d 257, 259. In *National Labor Relations Board v. Howell Chevrolet Co.* 204 F.2d 79, in answering a contention that uncontradicted testimony must be believed, this court stated:

> "This is an ancient fallacy which somehow persists depite the courts' numerous rulings to the contrary. It overlooks the significance of the carriage, behavior, bearing, manner and appearance of a witness—his demeanor—when his testimony is given orally in the presence of the trier of facts." (204 F.2d at p. 86)

(5) Appellant in its brief states, "Thefts at the Oakland Airport were not uncommon." (App. Br. 7) This statement is made in reliance upon the testimony of police inspector Gustavson who, on examination by appellant, testified that there had been "three or four" petty thefts at Oakland Airport, instances where "lockers had been broken into" and drawers of desks "pried open" with "some instrument". (R. 159) This evidence of forcible entry of lockers and desks by

petty thieves is so remote and is entitled to so little weight that it is surprising that appellant relies on it. If anything the element of *forcible entry* present in each of these instances points up the difference between an "outside" and an "inside" job and thus strengthens appellee's position.

(6) In its brief appellant also relies upon what it terms "the strongest of all rebuttable presumptions, namely, that a person is innocent of crime or wrong." (App. Br. 8) We do not, however, see how such presumption is entitled to any weight in the factual situation with which we are here concerned. First of all, it is clear and undeniable that the loss was caused by the fraud or dishonesty of some person or persons. Second, it is not necessary that the assured be able to designate the specific employe or employes causing the loss. (R. 4) We therefore have two categories, employes and non-employes, one of which must have been responsible for the theft in question. No reason is given, nor is any apparent, why the presumption of innocence is any more applicable to the employes as a group than to the non-employes as a group. Accordingly, we believe that the presumption is of no consequence here.

We believe that we have demonstrated that the evidence relied upon by appellant on this appeal must either be entirely disregarded or is entitled to little or no weight. In any event the most that can be said for appellant's evidence is that it might support an inference contrary to that reached by the trial court, but does not require such inference. Where different inferences are permissible, as we have shown, the inference drawn by the trial court must be sustained. In fact, it would appear that the inference for which appellant contends—to wit, that the loss was caused by the fraud or dishonesty of one or more non-employes without

the aid of any of the employes—is an inference that the trial court could not properly have drawn from the evidence.

To support such inference we would have to assume that the non-employe knew that a large sum of money was to be in the office that night, that he knew where it was to be kept, that he had the means—without the use of force—to get into the office, into the desk, and into the cash box, that he was familiar enough with the premises to do all of these things without causing any evident disarrangement, and that he accomplished all of this without being seen by anyone in the area. Merely to state this is to expose the weakness of appellant's theory.

In the only case we have found that is close to the present case on the facts and the contract, a recovery by the assured was affirmed on appeal. *Durham Pepsi-Cola Bottling Co. v. Maryland Cas. Co.* (1947), 228 N.C. 411, 45 S.E. 2d 375.

CONCLUSION

It is respectfully submitted that substantial evidence supports the crucial finding of the trial court that the evidence adduced reasonably establishes that the loss was due to the dishonesty of one or more of plaintiff's employes rather than to the act of a stranger and accordingly the judgment should be sustained on this appeal.

Dated, San Francisco
February 14, 1956.

Respectfully submitted,

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